BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES L. DINKEL	)	
Claimant	)	
VS.	)	
	)	Docket No. 177,409
INLAND CONTAINER CORP.	)	
Respondent	)	
AND	)	
	)	
HIGHLANDS INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the October 29, 2004 Review & Modification Decision entered by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on March 1, 2005.

APPEARANCES

Lawrence M. Gurney of Wichita, Kansas, appeared for claimant. Terry J. Malone of Dodge City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board is listed in the October 29, 2004 Review & Modification Decision. For clarification, however, the review and modification hearing transcript shows the date of hearing being March 12, 2003, when, in fact, the hearing was held on March 12, 2004.

The parties' original stipulations are contained in the May 17, 1996 Award entered by Special Administrative Law Judge Douglas F. Martin. The parties did not make any additional stipulations pertaining to this post-award proceeding.

ISSUES

Claimant injured his back working for respondent on July 28, 1992. On May 17, 1996, Judge Martin entered an Award granting claimant a 50 percent permanent partial general disability under K.S.A. 1992 Supp. 44-510e.

In this post-award proceeding, claimant requested payment of medical bills that were incurred after the May 17, 1996 Award and that his award be modified to grant him permanent total disability benefits. In the October 29, 2004 Review & Modification Decision, Judge Fuller granted claimant's requests. The Judge ordered respondent and its insurance carrier to pay outstanding medical bills that were related to claimant's work injury. Moreover, the Judge found claimant was entitled to receive permanent total disability benefits commencing August 20, 2003.

Respondent and its insurance carrier contend Judge Fuller erred. They argue claimant is capable of performing substantial, gainful employment. Accordingly, they request the Board to reverse the award of permanent total disability benefits.

Conversely, claimant contends the Review & Modification Decision should be affirmed.

The only issue before the Board on this appeal is whether claimant has established he is permanently and totally disabled from performing substantial, gainful employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant injured his low back working for respondent on July 28, 1992. Following that accident, claimant underwent surgery for a herniated lumbar disc. This claim was litigated and on May 17, 1996, Special Administrative Law Judge Douglas F. Martin entered an Award granting claimant benefits for a 50 percent permanent partial general disability under K.S.A. 1992 Supp. 44-510e. For purposes of that Award, the parties stipulated claimant sustained a 15 percent whole body functional impairment due to his low back injury.

Following the May 1996 Award, claimant underwent a second back surgery that was performed through the abdomen. That surgery was conducted in November 1997 and consisted of an anterior posterior interbody fusion at the fifth lumbar and first sacral vertebrae. Following the fusion, claimant underwent multiple abdominal surgeries to repair hernias that developed at the site of the abdominal incision related to the fusion, surgery

to repair a bowel perforation that occurred during one of the hernia repairs, and emergency surgery to correct a bowel obstruction and incarcerated ventral hernia. Claimant also developed peptic ulcer disease, which claimant's physician, Dr. Joanne D. Rink, attributed to the surgery to correct the bowel obstruction and the stress of that situation.

The principal issue in this post-award proceeding is whether claimant is now essentially and realistically unemployable. Respondent and its insurance carrier contend claimant is not permanently and totally disabled as claimant performed miscellaneous tasks in 2003 for a home health services company and was paid at least $2,555.98. In addition, respondent and its insurance carrier argue claimant demonstrated he could mow lawns, hang wallpaper, till and raise gardens, rebuild and repair cars, pull automobile engines, sell cars, handle water heaters, move furniture, remove carpet, and repair roofs, all of which claimant admitted to doing on a limited basis or with assistance over the last several years.

Claimant presented expert testimony from board-certified orthopedic surgeon Dr. C. Reiff Brown. Dr. Brown treated claimant's back in 1995 and 1996. According to Dr. Brown, who evaluated claimant at claimant's attorney's request in August 2003, claimant has a failed back syndrome, which is now worse as compared to when the doctor last treated claimant in early 1996. Furthermore, Dr. Brown concluded claimant was permanently and totally disabled as he could not perform any manual labor and would have difficulty performing even light work as he had to lay down and rest during the workday and avoid all vigorous activity. When asked about some of the physical activity claimant performed in 2003 for the health services company, the doctor replied claimant should be as active as possible to avoid physical deconditioning. Moreover, the doctor testified he did not believe claimant could successfully work eight hours a day, five days a week, with set work hours.

At Dr. Brown's deposition, claimant introduced the doctor's August 20, 2003 report, which summarizes the doctor's opinion that claimant is now unemployable.

> Considering that this man has no special training and has always done heavy manual labor, and considering that he has [the] inability to do any significant bending or lifting and it is necessary for him to frequently alternately sit/stand and even lay down, I believe from a practical stand point *[sic]* that he is unemployable. In my opinion, it will be necessary for him to avoid frequent bending more than 30 degrees in the lumbar spine, lifting over 10 pounds from lower levels, although he could, in a standing position, lift as much as 20 or 30 pounds utilizing his arms, as long as he did not bend the spine and as long as he could keep hands close to his body. All of this lifting would be done by his arms with only longitudinal loading stresses on the lumbar spine. In that situation, he could lift to this extent as long as he could alternately stop, sit down, or move about the room. He should not carry more than 10 pounds even about the confines of the room. He could do light work

> at a table or desk with his hands, as long as he is allowed to get up and move about he *[sic]* room as needed to avoid increasing discomfort with the prolonged sitting or standing.[1]

Respondent and its insurance carrier, on the other hand, presented the testimony of Dr. Philip R. Mills, who is board-certified in physical medicine and rehabilitation. Dr. Mills, who evaluated claimant at respondent and its insurance carrier's request, examined claimant in June 2004. Having treated claimant in 1993, Dr. Mills, like Dr. Brown, had also treated claimant for a period of time before the May 17, 1996 Award was entered.

At the June 2004 examination, claimant told Dr. Mills he had stabbing low back pain and stomach pain, which was aggravated by over-activity, prolonged sitting and prolonged standing, but relieved by laying down and hot tubs.

Similar to Dr. Brown, Dr. Mills also diagnosed failed back syndrome. According to Dr. Mills, claimant's diagnosis, functional impairment, and work restrictions had not changed over the intervening years since November 1993. Moreover, Dr. Mills testified there were "tasks" claimant could perform "in a work capacity" within his permanent work restrictions.[2] But on cross-examination, the doctor testified "a good argument or case could be made that there may be an impairment from the abdominal complications."[3]

In summary, Dr. Mills believed claimant could perform sedentary work but the odds of claimant returning to work were slim as claimant had not worked since 1993. The doctor testified, in part:

> Yes, his test of physical demand level for the functional capacity was sedentary to light. He would certainly not be greater than that. But the [October 26, 1993] FCE was partial submaximal effort, but I wouldn't think that he would be able to do more than sedentary to light work, and would be inclined to think it would be more sedentary than light at this time.
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> . . . .
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> He hasn't worked since '93, and is on social security disability. Studies show that if a person hasn't worked for two years, their odds of their returning are low, so he would have very low odds of going back to a remunerative-type work, and he hasn't

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[1] Brown Depo., Ex. 1 at 3.

[2] Mills Depo. at 12.

[3] *Id.* at 18.

> worked since '93, as I understand it. He was on social security then, he's on social security now. I don't see that that's changed.[4]

Dr. Brown and Dr. Mills were the only medical doctors in this post-award proceeding to address claimant's low back injury as it affected his present ability to work.

Likewise, Jerry D. Hardin was the only labor market expert to testify in this post-award proceeding about claimant's ability to work. Mr. Hardin, who met with claimant at his attorney's request in November 2003, concluded claimant was essentially and realistically unemployable based upon Dr. Brown's medical opinions and work restrictions. According to Mr. Hardin, claimant should be on Social Security disability:

> "It is my opinion, after considering Dr. Brown's [August 20, 2003] report, that Mr. Dinkel has a 100 percent loss and is essentially and realistically unemployable. He is unable to obtain or perform substantial, gainful employment and should be on social security."[5]

To counter Mr. Hardin's opinions, however, respondent and its insurance carrier presented the testimony of Carol Deleon, who lived with claimant for approximately four years, and the testimony of Christa McKinney, who owns a health services company that employed claimant in 2003 on a part-time basis to perform miscellaneous chores.

According to Ms. Deleon, claimant performed physical labor at their home, including working on cars for five or six hours a day, moving furniture, removing a water heater from the basement, removing carpeting, shingling, painting, and installing light fixtures. Ms. Deleon also testified claimant would sit at his computer for hours at a time. Moreover, Ms. Deleon stated claimant would complain of upper back pain but seldom complained about his lower back and that he was concerned about getting caught doing work. But on cross-examination, Ms. Deleon testified she helped claimant with the physical labor she observed claimant perform in their home.[6] And she did not answer the question when asked if she had ever observed claimant violate his medical restrictions when he worked on cars in his garage.[7]

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[4] *Id.* at 20-21.

[5] Hardin Depo. at 9.

[6] Deleon Depo. at 22.

[7] *Id.* at 21.

Ms. Deleon ceased living with claimant in September 2003. Their separation was not cordial and their present relationship is pugnacious, especially after claimant reported Ms. Deleon to the police after a physical confrontation.

Respondent and its insurance carrier also presented the testimony of Ms. McKinney, who hired claimant in 2003 to perform odd jobs. Ms. McKinney's company issued claimant a Form 1099 for the 2003 tax year, which indicated claimant received $2,555.98 in non-employee compensation. Ms. McKinney was not certain of claimant's hourly rate, which she believed was from $10 to $15 per hour, as claimant would submit statements to her.

According to Ms. McKinney, some of claimant's work included tilling, planting, and weeding a garden, installing a sprinkling system for the garden, installing some ceiling fans, repairing damaged vehicles, rebuilding shelving, and repairing shower chairs and other miscellaneous items. Ms. McKinney also testified claimant was concerned about being seen working and losing his Social Security disability benefits.

Judge Fuller concluded claimant was now permanently and totally disabled from engaging in any substantial and gainful employment. The Board affirms that finding. Following the May 1996 Award, claimant underwent a second back surgery and numerous abdominal surgeries that were related to the second back surgery. Dr. Mills' opinions that claimant's impairment and restrictions had not changed since November 1993 are not persuasive. Accordingly, the Board adopts the opinions of Dr. Brown that claimant is unable to perform any manual labor and would have difficulty doing light work as he must lay down and rest during the workday. Moreover, Dr. Brown stated claimant was not able to work set work hours for eight hours per day, five days per week. Dr. Brown determined claimant was unemployable.

Claimant is unable to perform substantial and gainful employment. Accordingly, claimant is entitled to receive permanent total disability benefits. The Board affirms the Judge's finding that the May 17, 1996 Award should be modified as claimant is entitled to receive permanent total disability benefits commencing August 20, 2003, which is the date Dr. Brown evaluated claimant and is within six months of the date claimant filed his application for review and modification. Accordingly, the October 29, 2004 Review & Modification Decision should be affirmed.

AWARD

WHEREFORE, the Board affirms the October 29, 2004 Review & Modification Decision entered by Judge Fuller.

IT IS SO ORDERED.

Dated this ____ day of March 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
Terry J. Malone, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director